The petitioners' unsupported assertions, however, do not cast doubt on the court's finding that the alternative chosen—that is, refunds to residents—was justified and reasonable.

Additionally, the petitioners misunderstand the legal standard set forth in this Court's caselaw. They state, again without citation, that the excess refund procedure violates the Privileges and Immunities Clause because it "facially discriminates" against part-year residents and non-residents. Petn. at 13 (heading A) and 14. Yet this Court, as noted above, has stated that such distinctions are permissible if they are "justified and reasonable." *Lunding*, 522 U.S. at 311. Likewise, petitioners claim that the Court of Appeals applied the "wrong standard" by focusing on *Lunding*'s "justified and reasonable" language instead of its "substantial basis" language. Petn. at 15-16. Yet the court below properly stated that the Privileges and Immunities Clause "bars discrimination against citizens of other states absent *substantial reason* for the discrimination beyond the mere fact that they are citizens of other states," 107 P.3d at 1068 (citing *Saenz*) (emphasis added), and thus plainly applied the proper standard.[7]

### B. Right to Travel

The "right to travel" encompasses "at least three different components." *Saenz*, 526 U.S. at 500. As this Court stated in *Saenz*:

> It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcomed visitor rather

[7] Similarly, petitioners suggest that the court below ignored this Court's statement in *Austin v. New Hampshire*, 420 U.S. 656, 666 n. 10 (1975), that "something more is required than bald assertion" to justify disparate treatment between residents and others. Petn. at 14. But, as noted above, the court cited this very proposition as stated in *Saenz*.

> than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

*Id.* Petitioners claim that they were denied the second and third components. Petn. at 21.

As for the second component, *Saenz* makes clear that the "welcomed visitor" protection—which covers "permissible justifications for discrimination between residents and nonresidents"— is provided for by the Privileges and Immunities Clause. 526 U.S. at 501-02. Petitioners' claim under this component is therefore duplicative of their Privileges and Immunities claim discussed above, and fails for the same reasons.

The third component, as noted above, applies to "travelers who elect to become permanent residents" of the particular state to which they have traveled. 526 U.S. at 500.[8] Importantly, petitioners cannot, by definition, claim a denial of this component of the right to travel because they do not claim to be permanent Colorado residents. Petn. at 6-7.

Moreover, as properly noted by the Court of Appeals, caselaw in this third category typically involves the "diminution of a basic necessity of life or an important right of citizenship based upon an individual's exercise of the right to travel." 107 P.3d at 1070. Examples cited by the court below include *Shapiro v. Thompson*, 394 U.S. 618 (1969), in which this Court invalidated a one-year state residency requirement for eligibility for government assistance, and *Dunn v. Blumstein*, 405 U.S. 330 (1972),

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[8] This component, the Court has stated, has its roots in the Privileges and Immunities Clause of the 14th Amendment. *Saenz*, 526 U.S. at 503.

which invalidated a one-year state residency requirement to vote. *See also Saenz*, 526 U.S. at 506 (citing *Shapiro* and invalidating California's durational residency requirement to obtain full benefits).

Even if this third category were available to non-residents and part-year residents such as petitioners, the Court of Appeals correctly found that petitioners had failed to state a claim in this case. According to the Court of Appeals, petitioners:

> do not allege they were denied basic necessities or that they fell within a class of financially insecure persons who lack access to state-provided resources. Nor do they assert the refund statutes affected an important right of citizenship. Rather, [they] merely argue they were treated less favorably than full-year residents.

107 P.3d at 1070. They make the same insufficient allegation in their petition before this Court. Petn. at 21 (arguing that their right to travel was "burdened" and "penalized" because refunds went to other taxpayers). Again, petitioners simply challenge the Court of Appeals' conclusion that the facts as alleged do not state a claim for a violation of the right to travel as defined by this Court.

Petitioners also seem to make the argument that the first component of the right to travel was violated as well, suggesting that they were improperly penalized for leaving the state. Petn. at 22. But as the court below found, petitioners "make no specific allegation as to how the mere possibility of a future refund hindered their right to travel." 107 P.3d at 1070. There is no reason to believe that the

possibility of a future refund either motivated them to come to Colorado, or prevented them from leaving.

### C. Equal Protection

For the most part, petitioners' equal protection claim is duplicative of their right to travel claim. *See, e.g.*, Petn. at 23 (referring to "a fundamental Right to Travel across State lines free of penalty or burden"). *See also Zobel v. Williams*, 457 U.S. 55, 60 n. 6 (1982) (noting that "right to travel analysis refers to little more than a particular application of equal protection analysis"). The Court of Appeals correctly found that, to the extent the claims are duplicative, they fail for the same reasons. 107 P.3d at 1071.

In the court below, petitioners argued for the creation of a "fundamental right to fair taxation," subject to strict scrutiny analysis. *Id.* The Court of Appeals declined to recognize such a right; to the contrary, it held that " 'legislatures possess the greatest freedom in classification' " in tax matters. *Id.* (citing *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)). The court went on to apply rational basis scrutiny to the excess refund provision, and found the standard easily met. 107 P.3d at 1071-72. As the court concluded:

> Here, the legislature was mandated by the Colorado Constitution to refund the surplus tax revenue. In crafting the refund mandated by TABOR, the [legislature] sought to address this legitimate state interest by refunding the surplus to those persons who had contributed most substantially to the surplus. Therefore, . . . it had a rational basis for refunding excess revenue to full-year residents. . . .

> Thus, we find no equal protection violation.

*Id.* at 1072.

In their submission to this Court, petitioners do not present the argument that they possess a "fundamental right to fair taxation." Instead, they attack the Court of Appeals' conclusion that the excess revenue refund provision is supported by a rational basis. Petn. at 24. At bottom, the petitioners challenge the application of the rational basis standard, not the standard itself. Additionally, they fundamentally misunderstand what is meant by the rational basis test. For example, they argue that Colorado's refund method should be struck down because there were other alternatives available to the legislature, including their preferred alternative of rate reduction. Petn. at 25. But under the rational basis standard, the state does not have to exclude other alternatives; it merely has to provide a rational basis for the one it did choose. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976) (*per curiam*).

### D. Dormant Commerce Clause

This Court has "consistently held that the Constitution's express grant to Congress of the power to 'regulate Commerce . . . among the several States' . . . contains a further, negative command, known as the dormant Commerce Clause. . . ." *American Trucking Associations, Inc. v. Michigan Public Service Comm'n*, ___ U.S. ___, 125 S. Ct. 2419, 2422 (2005) (citing U.S. Const. art. I, § 8, cl. 3; other citations and internal quotation marks omitted). This dormant aspect of the Commerce Clause creates "an area of trade free from interference by the States." *Id.* The main evil the dormant Commerce Clause seeks to eradicate is "economic protectionism—that is, regulatory measures

designed to benefit in-state economic interests by burdening out of state competitors." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) (citation and internal quotation marks omitted). The dormant Commerce Clause is not implicated, however, unless the state statute in question "discriminates against interstate commerce." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 576 (1997).

The Court of Appeals correctly found that the excess revenue provision in this case did not discriminate against interstate commerce. It noted that it does "not limit or restrict in any way [petitioners'] ability to access the markets in Colorado," nor "impair[] [their] access to interstate commerce." 107 P.3d at 1073. That is because they "could not have known whether there would be any refund when they did business in Colorado . . . ." *Id.* *See* Colo. Const. art. X § 20(7)(d) (providing that any "excess" revenue be refunded the fiscal year after it is collected). In other words, the refund provision did not discourage them from engaging in, or penalize their engagement in, interstate commerce. This fact is fatal to their claim. *Contrast Camps Newfound/Owatonna, Inc.*, 520 U.S. at 576 (tax exemption at issue "sing[ed] out camps that serve mostly in-staters for beneficial tax treatment, and penaliz[ed] those camps that do a principally interstate business"). Again, petitioners are merely attacking the Court of Appeals' factbound application of settled precedent.

Petitioners point to the fact they did indeed suffer some economic harm—namely, the fact that they did not receive a refund. Petn. at 17-18.[9] But suffering economic harm in and of itself is not enough; the harm must impede

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[9] The Court of Appeals mistakenly described this economic harm as an "incidental burden *on interstate commerce*," 107 P.3d at 1073 (emphasis added), but later in the opinion appropriately described it as "a small burden imposed *on [petitioners]*." *Id.* (emphasis added).

the flow of interstate commerce. Similarly, petitioners take the position that *any* distinction drawn between residents and non-residents for purposes of tax treatment violates the dormant Commerce Clause. Petn. at 18 (suggesting that since the excess refund provision "discriminates on its face," it is invalid). As noted above, this Court has sustained such distinctions where they are justified and reasonable. Petitioners' mistake is to claim that "facial discrimination"—in the abstract—implicates the dormant Commerce Clause. Petn. at 18. But as this Court made plain in *Camps Newfound/Owatonna*, the *per se* invalidity standard applies only to "State laws discriminating *against interstate commerce* on their face." 520 U.S. at 575 (emphasis added). As the Court of Appeals correctly found, petitioners failed to show such discrimination against interstate commerce occurred in this case.

## CONCLUSION

Petitioners argue that, as part-year residents and non-residents, they suffered unconstitutional discrimination when they did not receive a refund of excess revenue given to full-year Colorado residents. The Colorado Court of Appeals denied their claims. This Court should deny petitioners' request to review that ruling because the question at issue is Colorado-specific and because the court below properly applied this Court's well-settled precedents to the facts of this case.

Respectfully submitted,

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## RESPONDENTS' APPENDIX 1

Constitution of the State of Colorado [1876]
Article X.
**§ 20. The Taxpayer's Bill of Rights,**

**(1) General provisions.** This section takes effect December 31, 1992 or as stated. Its preferred interpretation shall reasonably restrain most the growth of government. All provisions are self-executing and severable and supersede conflicting state constitutional, state statutory, charter, or other state or local provisions. Other limits on district revenue, spending, and debt may be weakened only by future voter approval. Individual or class action enforcement suits may be filed and shall have the highest civil priority of resolution. Successful plaintiffs are allowed costs and reasonable attorney fees, but a district is not unless a suit against it be ruled frivolous. Revenue collected, kept, or spent illegally since four full fiscal years before a suit is filed shall be refunded with 10% annual simple interest from the initial conduct. Subject to judicial review, districts may use any reasonable method for refunds under this section, including temporary tax credits or rate reductions. Refunds need not be proportional when prior payments are impractical to identify or return. When annual district revenue is less than annual payments on general obligation bonds, pensions, and final court judgments, (4)(a) and (7) shall be suspended to provide for the deficiency.

**(2) Term definitions.** Within this section:

(a) "Ballot issue" means a non-recall petition or referred measure in an election.

(b) "District" means the state or any local government, excluding enterprises.

(c) "Emergency" excludes economic conditions, revenue shortfalls, or district salary or fringe benefit increases.

(d) "Enterprise" means a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined.

(e) "Fiscal year spending" means all district expenditures and reserve increases except, as to both, those for refunds made in the current or next fiscal year or those from gifts, federal funds, collections for another government, pension contributions by employees and pension fund earnings, reserve transfers or expenditures, damage awards, or property sales.

(f) "Inflation" means the percentage change in the United States Bureau of Labor Statistics Consumer Price Index for Denver-Boulder, all items, all urban consumers, or its successor index.

(g) "Local growth" for a non-school district means a net percentage change in actual value of all real property in a district from construction of taxable real property improvements, minus destruction of similar improvements, and additions to, minus deletions from, taxable real property. For a school district, it means the percentage change in its student enrollment.

**(3) Election provisions.**

(a) Ballot issues shall be decided in a state general election, biennial local district election, or on the first Tuesday in November of odd-numbered years. Except for petitions, bonded debt, or charter or constitutional provisions, districts may consolidate ballot issues and voters may approve a delay

of up to four years in voting on ballot issues. District actions taken during such a delay shall not extend beyond that period.

(b) At least 30 days before a ballot issue election, districts shall mail at the least cost, and as a package where districts with ballot issues overlap, a titled notice or set of notices addressed to "All Registered Voters" at each address of one or more active registered electors. The districts may coordinate the mailing required by this paragraph (b) with the distribution of the ballot information booklet required by section 1(7.5) of article V of this constitution in order to save mailing costs. Titles shall have this order of preference: **"NOTICE OF ELECTION TO INCREASE TAXES/TO INCREASE DEBT/ON A CITIZEN PETITION/ON A REFERRED MEASURE."** Except for district voter-approved additions, notices shall include only:

(i) The election date, hours, ballot title, text, and local election office address and telephone number.

(ii) For proposed district tax or bonded debt increases, the estimated or actual total of district fiscal year spending for the current year and each of the past four years, and the overall percentage and dollar change.

(iii)For the first full fiscal year of each proposed district tax increase, district estimates of the maximum dollar amount of each increase and of district fiscal year spending without the increase.

(iv) For proposed district bonded debt, its principal amount and maximum annual and total district repayment cost, and the principal balance of total current district bonded debt and its maximum annual and remaining total district repayment cost.

(v) Two summaries, up to 500 words each, one for and one against the proposal, of written comments filed with the election officer by 45 days before the election. No summary shall mention names of persons or private groups, nor any endorsements of or resolutions against the proposal. Petition representatives following these rules shall write this summary for their petition. The election officer shall maintain and accurately summarize all other relevant written comments. The provisions of this subparagraph (v) do not apply to a statewide ballot issue, which is subject to the provisions of section 1(7.5) of article V of this constitution.

(c) Except by later voter approval, if a tax increase or fiscal year spending exceeds any estimate in (b)(iii) for the same fiscal year, the tax increase is thereafter reduced up to 100% in proportion to the combined dollar excess, and the combined excess revenue refunded in the next fiscal year. District bonded debt shall not issue on terms that could exceed its share of its maximum repayment costs in (b)(iv). Ballot titles for tax or bonded debt increases shall begin, **"SHALL (DISTRICT) TAXES BE INCREASED (first, or if phased in, final, full fiscal year dollar increase) ANNUALLY...?" or "SHALL (DISTRICT) DEBT BE INCREASED (principal amount), WITH A REPAYMENT COST OF (maximum total district costs),...?"**

**(4) Required elections.** Starting November 4, 1992, districts must have voter approval in advance for:

(a) Unless (1) or (6) applies, any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district.

(b) Except for refinancing district bonded debt at a lower interest rate or adding new employees to existing district pension plans, creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years.

**(5) Emergency reserves.** To use for declared emergencies only, each district shall reserve for 1993 1% or more, for 1994 2% or more, and for all later years 3% or more of its fiscal year spending excluding bonded debt service. Unused reserves apply to the next year's reserve.

**(6) Emergency** taxes. This subsection grants no new taxing power. Emergency property taxes are prohibited. Emergency tax revenue is excluded for purposes of (3)(c) and (7), even if later ratified by voters. Emergency taxes shall also meet all of the following conditions:

(a) A 2/3 majority of the members of each house of the general assembly or of a local district board declares the emergency and imposes the tax by separate recorded roll call votes.

(b) Emergency tax revenue shall be spent only after emergency reserves are depleted, and shall be refunded within 180 days after the emergency ends if not spent on the emergency.

(c) A tax not approved on the next election date 60 days or more after the declaration shall end with that election month.

**(7) Spending limits.** (a) The maximum annual percentage change in state fiscal year spending equals inflation plus the percentage change in state population in the prior calendar

year, adjusted for revenue changes approved by voters after 1991. Population shall be determined by annual federal census estimates and such number shall be adjusted every decade to match the federal census.

(b) The maximum annual percentage change in each local district's fiscal year spending equals inflation in the prior calendar year plus annual local growth, adjusted for revenue changes approved by voters after 1991 and (8)(b) and (9) reductions.

(c) The maximum annual percentage change in each district's property tax revenue equals inflation in the prior calendar year plus annual local growth, adjusted for property tax revenue changes approved by voters after 1991 and (8)(b) and (9) reductions.

(d) If revenue from sources not excluded from fiscal year spending exceeds these limits in dollars for that fiscal year, the excess shall be refunded in the next fiscal year unless voters approve a revenue change as an offset. Initial district bases are current fiscal year spending and 1991 property tax collected in 1992. Qualification or disqualification as an enterprise shall change district bases and future year limits. Future creation of district bonded debt shall increase, and retiring or refinancing district bonded debt shall lower, fiscal year spending and property tax revenue by the annual debt service so funded. Debt service changes, reductions, (1) and (3)(c) refunds, and voter-approved revenue changes are dollar amounts that are exceptions to, and not part of, any district base. Voter-approved revenue changes do not require a tax rate change.

**(8) Revenue limits.** (a) New or increased transfer tax rates on real property are prohibited. No new state real property tax or local district income tax shall be imposed. Neither an income tax rate increase nor a new state definition of

taxable income shall apply before the next tax year. Any income tax law change after July 1, 1992 shall also require all taxable net income to be taxed at one rate, excluding refund tax credits or voter-approved tax credits, with no added tax or surcharge.

(b) Each district may enact cumulative uniform exemptions and credits to reduce or end business personal property taxes.

(c) Regardless of reassessment frequency, valuation notices shall be mailed annually and may be appealed annually, with no presumption in favor of any pending valuation. Past or future sales by a lender or government shall also be considered as comparable market sales and their sales prices kept as public records. Actual value shall be stated on all property tax bills and valuation notices and, for residential real property, determined solely by the market approach to appraisal.

**(9) State mandates.** Except for public education through grade 12 or as required of a local district by federal law, a local district may reduce or end its subsidy to any program delegated to it by the general assembly for administration. For current programs, the state may require 90 days notice and that the adjustment occur in a maximum of three equal annual installments.

## RESPONDENTS' APPENDIX 2

**C.R.S. 39-22-120**

(1) The general assembly hereby finds and declares that:

(a) Section 20 of article X of the state constitution, which was approved by the registered electors of this state in 1992, limits the annual growth of state fiscal year spending;

(b) During the 1997-98 fiscal year, state revenues from sources not excluded from state fiscal year spending exceeded the limitation on state fiscal year spending;

(c) When revenues exceed the state fiscal year spending limitation for any given fiscal year, section 20(7)(d) of article X of the state constitution requires that the excess revenues be refunded in the next fiscal year unless voters approve a revenue change allowing the state to keep the revenues;

(d) In addition, section 20(1) of article X of the state constitution states that refunds need not be proportional when prior payments are impractical to identify or return and authorizes the use of any reasonable method for refunding excess revenues;

(e) The state is required to refund during the 1998-99 fiscal year all revenues in excess of the state fiscal year spending limitation for the 1997-98 fiscal year; except that, if at the 1998 general election voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, the state is required to refund only that portion of the state excess revenues for the 1997-98 fiscal year that the voters have not authorized the state to

retain;

(f) It is within the legislative prerogative of the general assembly to enact legislation to implement the refund of state excess revenues for the 1997-98 fiscal year in compliance with section 20 of article X of the state constitution;

(g) It is a reasonable and necessary exercise of the legislative prerogative to determine that, due to the impossibility of identifying or returning prior payments, it is not feasible to make proportional refunds of state excess revenues;

(h) It is also a reasonable and necessary exercise of the legislative prerogative to determine what constitutes a reasonable method of refunding state excess revenues after consideration of the best information available at the time regarding: The amount and source of excess revenues to be refunded; the qualifications for and number of eligible recipients; the amount of refund each recipient should receive; the necessary procedures to claim and make refunds; and the related administrative expenses;

(i) It is the considered judgment of the general assembly that:

(I) The state excess revenues for the 1997-98 fiscal year are derived from a wide variety of state taxes and fees ranging from state sales tax to severance and transportation taxes to health service fees to court fines to permit and license fees and to higher education fees and should, therefore, be returned to as large a group of Colorado residents as is identifiable and economically feasible;

(II) It is not feasible to make proportional refunds of state excess revenues for the 1997-98 fiscal year due to the impossibility of identifying or returning prior payments;

(III) It is reasonable and fair to refund state excess revenues for the 1997-98 fiscal year to a large group of individuals as a refund of state sales tax revenues since more Coloradans pay state sales tax than any other state tax;

(IV) The state collected over one billion four hundred fourteen million dollars in state sales tax revenues during the 1997-98 fiscal year from which the refund of state excess revenues may be made;

(V) Refunding state excess revenues for the 1997-98 fiscal year through the state income tax system in the manner set forth in this section is a reasonable method for refunding such excess revenues; and

(VI) The most cost-effective and expeditious method of refunding state excess revenues for the 1997-98 fiscal year is through the state income tax system but that a refund offset against state income tax liability is merely a mechanism for refunding said state excess revenues to a broad spectrum of persons.

(2)(a) As used in this section, "qualified individual" means:

(I) A natural person who is domiciled in this state for the entire taxable year commencing on January 1, 1998, and ending December 31, 1998, and who is required to file a Colorado individual income tax return for that tax year pursuant to section 39-22-601(1)(a) or who files a Colorado individual income tax return to claim a refund of Colorado income tax withheld from wages for that tax year; or

(II) Any natural person who is domiciled in this state for the entire taxable year commencing on January 1, 1998, and ending December 31, 1998, and who is at least eighteen years of age as of December 31, 1997; or

(III) A natural person who died during the taxable year commencing on January 1, 1998, and ending December 31, 1998, who was domiciled in this state from January 1, 1998, until the date of death, and whose estate or spouse is required to file a Colorado individual income tax return for that tax year pursuant to section 39-22-601(1)(a) or whose estate or spouse files a Colorado income tax return to claim a refund of Colorado income tax withheld from wages for that tax year; or

(IV) A natural person who died during the taxable year commencing on January 1, 1998, and ending December 31, 1998, who was domiciled in this state from January 1, 1998, until the date of death, and who was at least eighteen years of age as of December 31, 1997.

(b) "Qualified individual" does not include:

(I) Any natural person who was convicted of a felony and who served a sentence of incarceration in a correctional facility operated by or under contract with the department of corrections or in a county or municipal jail awaiting transfer to the department of corrections pursuant to section 16-11-308, C.R.S., or in both such facility and jail for a total of one hundred eighty days or more during the 1997-98 fiscal year, regardless of whether such person meets the qualifications set forth in paragraph (a) of this subsection (2);

(II) Any natural person who is convicted of a misdemeanor or is adjudicated for an offense that would constitute a misdemeanor if committed by an adult and who is incarcerated in a county or municipal jail for a total of one hundred eighty days or more during the 1997-98 fiscal year, regardless of whether such person meets the qualifications set forth in paragraph (a) of this subsection (2);

(III) Any person under eighteen years of age who is

adjudicated for an offense that would constitute a felony if committed by an adult and who was committed to the department of human services for a total of one hundred eighty days or more during the 1997-98 fiscal year, regardless of whether such person meets the qualifications set forth in paragraph (a) of this subsection (2).

(3) With respect to the taxable year commencing on January 1, 1998, and ending December 31, 1998, there shall be allowed to each qualified individual a state sales tax refund in an amount specified in subsection (4) of this section with respect to the income taxes imposed by this article.

(4) The amount of the refund allowed under this section shall be as follows:

(a) For a qualified individual filing a single return for the 1998 tax year:

(I) If the qualified individual's federal adjusted gross income for the 1998 tax year is less than or equal to twenty thousand dollars, the refund shall be in the amount of one hundred forty-two dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund shall be in the amount of ninety-two dollars;

(II) If the qualified individual's federal adjusted gross income for the 1998 tax year is greater than twenty thousand dollars but not more than fifty thousand dollars, the refund shall be in the amount of one hundred ninety-five dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund shall be in the amount of one hundred twenty-six dollars;

(III) If the qualified individual's federal adjusted gross

income for the 1998 tax year is greater than fifty thousand dollars but not more than ninety-five thousand dollars, the refund shall be in the amount of two hundred seventy-six dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund shall be in the amount of one hundred seventy-eight dollars;

(IV) If the qualified individual's federal adjusted gross income for the 1998 tax year is greater than ninety-five thousand dollars, the refund shall be in the amount of three hundred eighty-four dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund shall be in the amount of two hundred forty-eight dollars;

(b) For two qualified individuals filing a joint return for the 1998 tax year:

(I) If the qualified individuals' aggregate federal adjusted gross income for the 1998 tax year is less than or equal to twenty thousand dollars, the refund shall be in the amount of two hundred eighty-four dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund shall be in the amount of one hundred eighty-four dollars;

(II) If the qualified individuals' aggregate federal adjusted gross income for the 1998 tax year is greater than twenty thousand dollars but not more than fifty thousand dollars, the refund shall be in the amount of three hundred ninety dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund

shall be in the amount of two hundred fifty-two dollars;

(III) If the qualified individuals' aggregate federal adjusted gross income for the 1998 tax year is greater than fifty thousand dollars but not more than ninety-five thousand dollars, the refund shall be in the amount of five hundred fifty-two dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund shall be in the amount of three hundred fifty-six dollars;

(IV) If the qualified individuals' aggregate federal adjusted gross income for the 1998 tax year is greater than ninety-five thousand dollars, the refund shall be in the amount of seven hundred sixty-eight dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund shall be in the amount of four hundred ninety-six dollars.

(5)(a)(I) Except as otherwise provided in subparagraph (II) of this paragraph (a), any refund allowed pursuant to this section shall be claimed by a qualified individual as defined in subparagraph (I) or (III) of paragraph (a) of subsection (2) of this section by filing a 1998 income tax return with the department of revenue no later than April 15, 1999.

(II) Any refund allowed pursuant to this section shall be claimed by a qualified individual as defined in subparagraph (I) or (III) of paragraph (a) of subsection (2) of this section who is granted an extension of time to file a 1998 income tax return by filing a 1998 income tax return with the department of revenue no later than October 15, 1999. Such qualified individual shall not be required to pay all or any portion of the qualified individual's net tax liability due prior to October

15, 1999, in order to be granted an extension of time to file said tax return; except that, pursuant to section 39-22-621, such qualified individual may be subject to a late payment penalty and interest on any net income tax liability not paid by April 15, 1999.

(III) The department of revenue shall not allow said refund claimed on any 1998 income tax return not filed in compliance with the provisions of this article. In no event shall the refund claimed by a qualified individual as defined in subparagraph (I) or (III) of paragraph (a) of subsection (2) of this section on any 1998 income tax return be:

(A) Disallowed if said return is filed on or before October 15, 1999; and

(B) Allowed if said return is filed after October 15, 1999.

(b) Any refund allowed pursuant to this section shall be claimed by a qualified individual as defined in subparagraph (II) or (IV) of paragraph (a) of subsection (2) of this section by filing a 1998 income tax return with the department of revenue no later than April 15, 1999. The department of revenue shall not allow said refund claimed by a qualified individual as defined in subparagraph (II) or (IV) of paragraph (a) of subsection (2) of this section on any 1998 income tax return filed with the department of revenue after April 15, 1999.

(c)(I) Notwithstanding any provision of paragraph (b) of this subsection (5) to the contrary, a qualified individual as defined in subparagraph (II) or (IV) of paragraph (a) of subsection (2) of this section who claims a property tax assistance grant pursuant to section 39-31-101 or a heat or fuel expenses assistance grant pursuant to section 39-31-104 may claim a refund authorized by this section on the assistance grant application form described in section 39-31-

102(2). Claiming a refund on such assistance grant application form shall be in lieu of claiming the refund on an income tax return pursuant to paragraph (b) of this subsection (5). Any refund claimed pursuant to this paragraph (c) shall be claimed on or before April 15, 1999.

(II) The department of revenue shall not allow a refund authorized by this section that is claimed on an assistance grant application form if:

(A) The assistance grant application form is filed after April 15, 1999; or

(B) The qualified individual has claimed the refund authorized by this section on an income tax form filed in accordance with paragraph (b) of this subsection (5) for the tax year for which the refund is allowed.

(5.5)(a) The department of revenue shall make a state sales tax refund of excess revenues for the 1996-97 fiscal year to any qualified individual, as defined in paragraph (a) of subsection (2) of this section as said section existed for purposes of refunding excess revenues for the 1996-97 fiscal year and prior to the amendments to said section contained in House Bill 98S-1003, enacted at the second extraordinary session of the sixty-first general assembly, who, pursuant to a rule of the department of revenue, was not allowed such state sales tax refund because of the failure to pay all or any portion of such qualified individual's net tax liability due prior to a certain date.

(b) The department of revenue shall notify each qualified individual described in paragraph (a) of this subsection (5.5) of the allowance of such refund and make payment of such refunds to such qualified individuals no later than September 30, 1999.

(c) The amount of any state sales tax refund made pursuant to this subsection (5.5) that is outstanding for more than six months after the date such refund was issued to the taxpayer by the department of revenue shall be added to and refunded with the state excess revenues pursuant to section 39-22-120.5.

(6) If the refund allowed under this section exceeds the income taxes otherwise due on the claimant's income, the amount of the refund not used as an offset against income taxes may not be carried forward as an offset against subsequent years' income tax liability and shall be refunded to the claimant.

(7) In addition to any other penalties allowed by law, any person who claims but is not eligible to claim the refund allowed pursuant to this section shall be subject to the criminal penalties imposed pursuant to section 39-21-118, as applicable.

(8) The state sales tax refund allowed to any qualified individual under this section shall not be reported by the department of revenue as a payment of a refund, credit, or offset of state income taxes to such qualified individual in any information return required to be filed pursuant to federal law.

(9) The executive director shall not print individual income tax forms for the 1998 taxable year until the results of the 1998 general election are known so that forms will reflect the impact of the results of said election on the amount of the refund to be allowed in accordance with subsection (4) of this section.

(10) The department of revenue shall identify any qualified individual who has been convicted of a felony and who, at the time of filing for a refund pursuant to this section, is

incarcerated in a correctional facility operated by or under contract with the department of corrections or in a county or municipal jail awaiting transfer to a correctional facility pursuant to section 16-11- 308, C.R.S. The department of revenue shall transfer the amount of any refund owed to said qualified individual to the department of corrections. The department of corrections shall transmit the amount of said refund to the clerk of the district court which issued an order for payment of restitution or an order for costs pursuant to section 18-1.3-701, C.R.S. Such refund shall be credited in the priority specified in section 16-11-101.6(1), C.R.S.

(11) The department of corrections, the department of human services, and each county of the state, to the extent each such county has the capability within existing resources, shall provide in a timely manner the information requested by the department of revenue necessary to identify the persons specified in paragraph (b) of subsection (2) of this section and in subsection (10) of this section. The information shall be provided in the form requested by the department of revenue. The department of revenue shall maintain the confidentiality of any social security number received pursuant to this subsection (11).

No. 04-1541

Supreme Court, U.S.
FILED
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IN THE

# Supreme Court of the United States

JOHN K. THORPE, ELISHA E. SPRONG, DARRELL J. VIGIL, SEAN P. LEY, AND HECTOR JUAREZ, ON BEHALF OF THEMSELVES AND A PROPOSED CLASS OF ALL OTHER TAXPAYERS SIMILARLY SITUATED,

*Petitioners,*

*v.*

STATE OF COLORADO AND M. MICHAEL COOKE, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF REVENUE AND TAX COLLECTOR, IN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

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## ARGUMENT

Respondents flatly concede the fundamental point that makes this case appropriate for Supreme Court review: Colorado's taxing regime discriminates on its face against Lesser Residents[1] and Non-Residents by limiting *exclusively* to Preferred Residents a refund of taxes paid by *all* Colorado taxpayers (including Non-Residents and Lesser Residents). *See* Br. at 2. Because such conceded discrimination is profoundly offensive to our Constitution and runs counter to established precedent, Respondents devote their opposition to an effort to marginalize the case, suggesting that it is "unique." As demonstrated below, this case is no more "unique" constitutionally than the typical controversy involving a state's tax discrimination against non-residents. More importantly, however, Respondents fail to address the fundamental, substantive claim in this case, namely that Colorado discriminates against Non-Residents and Lesser Residents when less costly, more efficient and non-discriminatory methods are available to achieve the State's objective under TABOR. Pet., App. B at 43a.

### I. This Case Is Not "Unique" In The Constitutional Sense

Colorado's discrimination here is fundamental and incontrovertible. Respondents nevertheless argue that review of this case is inappropriate because it is "unique." (Br. at 3-5) This case, however, is indistinguishable from many other state cases involving statutes discriminating against nonresidents that have been struck by this Court. *See, e.g., Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870) (declaring unconstitutional a discriminatory tax on nonresident merchants); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) (striking a New York statute that denied to nonresidents personal tax exemptions provided

1. The defined terms herein are incorporated by reference from the Petition ("Pet."); *see, e.g.*, Pet. at 3, 7.

to residents); *Toomer v. Witsell*, 334 U.S. 385 (1948) (striking a state statute that required non-resident fishermen to pay higher license fees than residents); *Austin v. New Hampshire*, 420 U.S. 656 (1975) (striking state tax that increased net tax paid by nonresidents without increasing net tax paid by residents), and *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287 (1998) (striking a state statute that allowed residents an alimony deduction while denying to non-residents the same tax benefit).

What makes this case worthy of review is that same common thread that made all of the foregoing cases worthy of review: it represents an "entering wedge" of discrimination. As Chief Judge Cardozo wisely observed, when writing for the New York Court of Appeals, in striking a discriminatory tax statute:

> The principle of equal treatment for the citizens of all the States is a good deal more precious than the gain of revenue in one year or another. We are not to whittle it down by refinement of exception or by the implication of a reciprocal advantage that is merely trivial or specious. The principle is put in jeopardy — there is set in it an entering wedge that may be the beginning of its destruction — if this statute is upheld.

*Smith v. Loughman*, 245 N.Y. 486, 496-97, 157 N.E. 753, 757, *cert. denied*, 275 U.S. 560 (1927) With this fundamental principle as a guiding light, it is apparent that Respondents' effort to divert the Court's attention from the fundamental issue in this case must fail. The issue in this case is not Colorado's "unique" "Budgeting System" (Br. at 3-5 ) — presumably every state has a somewhat "unique" system. Rather, the fundamental issue is whether Preferred Residents enjoy a tax benefit that Lesser Residents and Non-Residents do not have the same privilege of enjoyment because of the existence or length of residency requirements. Petitioners have demonstrated — and

Respondents concede — that discrimination exists. The only question then is whether Respondents proffered justification passes constitutional muster. As demonstrated below, it does not. If the decision below is allowed to stand, states (and municipalities) will be encouraged to discriminate against nonresidents in countless "unique" ways limited only by the imagination of state legislators. In summary, discrimination always arises in a particular statutory or factual context, but that does not legitimize it.

## II. Respondents' Privileges And Immunities Clause Argument Is Irreconcilable With *Lunding v. New York Tax Appeals Tribunal*

Discriminatory taxation of Lesser Residents and Non-Residents — the incontrovertible fact that lies at the heart of this case — is unconstitutional under the Privileges and Immunities Clause unless the State can demonstrate a "substantial reason for the discrimination beyond the mere fact that they are citizens of other states" (*Toomer*, 334 U.S. at 396, 399) and that "'the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.'" *Lunding*, 522 U.S. at 298, quoting *Supreme Court of N. H. v. Piper*, 470 U.S. 274, 284 (1985). Respondents fail to demonstrate that either one standard or the other has been met. Precisely because Respondents fail to demonstrate that Lesser Residents and Non-Residents constitute a particular or exclusive source of evil or danger to the State, there can be no "substantial reason" to overcome the admitted discrimination. *See Toomer*, 334 U.S. at 396-399; *Lunding*, 522 U.S. at 298, and *Hicklin v. Orbeck*, 437 U.S. 518, 525-26 (1978) (striking state statute giving hiring preferences to Alaska residents to work on Alaska pipelines)[2] This, among others, is a fatal defect in Respondent's position.

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2. It is noteworthy that the Alaska Supreme Court had previously held that the state's one year durational residency requirement was unconstitutional under the Equal Protection Clause. *Hicklin*, at 522-523.

Indeed, this case is squarely controlled by the Court's decision in *Lunding v. New York Tax Appeals Tribunal, supra*, which struck down under the Privileges and Immunities Clause a New York statute that allowed residents an alimony deduction while denying nonresidents any tax deduction. There is no question that a "complete denial" to non-residents of the same tax benefit enjoyed by residents is unconstitutional. *Id.* at 307. That principle is applicable here. Respondents' purported justification for the "complete denial" to Non-Residents and Lesser Residents of the tax benefit enjoyed by Preferred Residents is far less "substantial" than the justifications that this Court flatly rejected in *Lunding*, 522 U.S. 287. The justification that Respondents proffer is the difficulty of "track[ing] the amount of various taxes that individuals . . . paid in a given year. Br. at 7. But this difficulty is not a "substantial reason" for the *complete denial* to Non-Residents and Lesser Residents of the same tax benefit enjoyed by Preferred Residents, especially when that so-called difficulty also would apply to Preferred Residents.[3] There is simply nothing about the administrative difficulty in identifying all the taxpayers who contributed to tax revenues which makes it constitutional to discriminate based on the existence or length of residency.

Even if Respondents could find some legitimate administrative justification for the discrimination, that would not save it. A discriminatory tax

> "[c]lassification may be supported by many considerations of expediency or fairness and, nonetheless, may be illegal if it denies to the citizens

3. Lesser Residents and Non-Residents are in the same position as Preferred Residents regarding the State's proffered justification. Most Lesser Residents (nearly 210,000) and many Non-Residents (nearly 78,000) are required to file income tax returns with and pay income tax to the State. *See* Pet. at 8, 18, 25. Lesser Residents and Non-Residents are also required to pay State sales tax. *Id.*; *see also* Pet., App. G at 68a-69a.

> of any State the privileges and immunities that belong to citizens of another. To put it differently, equality in such circumstances is itself the highest policy, to which other policies must bow."

*Borden v. Selden*, 259 Iowa 808, 815, 146 N.W. 2d 306, 312 (1966) (striking down a state statute granting tax credits to Iowa-resident property owners and not also to non-resident property owners), quoting *Smith v. Loughman*, *supra*, 245 N.Y. at 491, 157 N.E. at 755.

Further, there is no "substantial relationship" between the TABOR (State) objective and the discrimination practiced because: (1) The District Court explicitly found that "[o]f the alternative methods considered by the State, the method of refund selected is neither the least costly nor the most administratively convenient." Pet., App. B, at 43a; (2) Although across-the-board tax rate reductions or credits, as expressly suggested by TABOR, may not be proportional in every instance, they evidence TABOR's intent to be non-discriminatory as a general rule; and (3) This is not a case where there is isolated or incidental discrimination as the result of some legitimate practice. This is a case where the practiced discrimination operates as a pervasive, general rule. *See Travis,* 252 U.S. at 80-81.

In short, the TABOR (State) objective could have been accomplished by alternative, non-discriminating methods. Because there are more economical, efficient, and non-discriminatory methods[4] of reducing or refunding tax revenues under TABOR, and that Non-Residents and Lesser Residents

4. In addition to across-the-board tax rate reductions or tax credits, another method, among others, of a less discriminatory Sales Tax Refund would be for the State to refund excess revenues to all residents and non-residents who filed income tax returns, upon which the Sales Tax Refund was based, or verified applications with the State.

are not a "source of the evil" that the discrimination purportedly addresses, there is no constitutional basis for finding that (a) there is a "substantial reason" for the discrimination, and (b) there is a "substantial relationship" between the TABOR objective and the discrimination practiced.

## III. Respondents' Commerce Clause Argument Is Nonsensical

Respondents have no meaningful response to Petitioners' fundamental Commerce Clause claim that the Sales Tax Refund Statute discriminates against interstate commerce by favoring Preferred Residents at the expense of Lesser Residents and Non-Residents. The reason is that Colorado's refund procedure is a quintessential Commerce Clause violation of a type that the Court has consistently struck down. Respondents argue that even though Petitioners "did indeed suffer . . . economic harm," Br. at 13, this harm does not rise to the level of a prohibited burden because they "could not have known whether there would be any refund when they did business in Colorado," (*id.*, quoting Court of Appeals), and thus could not have protected themselves from it. No case, however, has ever sanctioned a burden or penalty on interstate commerce because those subject to it could not protect themselves. The fact that Respondents seek to justify the discrimination with the assertion that unwitting taxpayers "couldn't have seen it coming" evidences a dismaying lack of regard for the Commerce Clause and only underscores the need for this Court's intervention.

## IV. Respondents' Right To Travel Argument Is Misplaced

The Sales Tax Refund Statute unquestionably penalizes the constitutional right of interstate travel. It penalizes traveling to relocate one's residence out of Colorado before year-end; it penalizes living in another state and traveling to Colorado to

work; and it penalizes taxpayers who travel to Colorado to reside permanently there because they are not treated like other citizens until they have resided in Colorado for at least one full-calendar year. Thus, it could be nearly 24 consecutive months before these taxpayers become eligible to receive a Sales Tax Refund. Pet. at 5-6.

Respondents' contention that discriminatory taxation of Lesser Residents and Non-Residents is not "important" (Br. at 9, quoting Court of Appeals) enough to implicate the Right to Travel is remarkable. Taxes are vitally important to every citizen, as evidenced by the fact that Colorado enacted TABOR. Taxes are one of the principal means of implementing social policy at every level of government and provide incentives to citizens as they move about the country. This Court has long recognized that the Right to Travel free of penalty in the form of a discriminatory tax is unconstitutional. *Crandall v. Nevada*, 73 U.S. 35 (1868).

## V. Respondents' Equal Protection Clause Argument Lacks Merit

Respondents essentially argue that there is no equal protection violation because the State had a need to refund, and thus a legitimate "interest" in refunding, the excess revenues. Br. at 11-12, quoting Court of Appeals[5] The "need" to reduce or refund excess revenues does not give rise to a corresponding constitutional "need" to discriminate based on the existence or length of residency. This is especially so because there are any number of residence-neutral methods for complying with TABOR. *See* Pet. at 5, 43a. Colorado's inability to identify every taxpayer who contributed to the excess revenues does not compel, or even suggest, resorting to a discriminatory, residence-

5. Respondents mis-characterize Petitioners' position under the Equal Protection Clause. *See* Pet. at 23-26.

based refund scheme.[6] Colorado's residence-based scheme is a function of nothing more than Colorado's desire to benefit its Preferred Residents at the expense of Lesser Residents and Non-Residents, especially since the State has the name and address of each Lesser Resident and Non-Resident, just like each Preferred Resident, who pays Colorado income taxes. The State has no legitimate interest in benefitting Preferred Residents at the expense of Lesser Residents and Non Residents based on the existence or length of residency. As this Court has long recognized, "[t]he Equal Protection clause prohibits . . . apportionment of state services" on the basis of length of residency. *See Zobel v. Williams*, 457 U.S. 55, 63 (1982), quoting *Shapiro v. Williams*, 394 U.S. 618, 632-33 (1969).[7]

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6. It is important that TABOR does not necessarily require tax refunds, as the constitutional amendment specifically suggests that non-discriminatory rate reductions and tax credits to achieve its objective. *See* Pet. at 5. Colorado chose a discriminatory refund among many options at its disposal.

7. Lesser-Residents who travel from other states to Colorado to reside permanently there are not treated like Preferred Residents under Colorado's tax regime until they have resided in Colorado for at least one full-calendar year, which means it could be nearly 24 consecutive months in the State before they are "qualified" to receive a Sales Tax Refund, although they pay taxes to the State from day one. *See* Pet. at 5-6, 25.

## CONCLUSION

For the foregoing reasons, the judgment below of the Court of Appeals of Colorado should be reversed and the Sales Tax Refund Statute (C.R.S. § 39-22-120) should be stricken under the Constitution of the United States.

Dated: October 4, 2005

Respectfully submitted,

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